Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections	)	
3(n) and 332 of the Communications	)	GN Docket No. 93-252
Act - Regulatory Treatment of	)	
Mobile Services	)	
	)	
TO: The Commission	)	

COMMENTS
OF
NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.

Respectfully submitted,
National Association of Business
and Educational Radio, Inc.

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SUMMARY

Following adoption of the Commission's Notice of Proposed Rule Making, Emmett B. Kitchen, President of NABER, issued an industry "White Paper" addressed to the NABER membership and its six (6) separate sections. In determining the types of "like" regulation for "similar types of mobile service providers", the Commission should allow the maximum degree of forbearance of its Title II authority, except for those CMS providers which may have obtained, either through significant spectrum holdings or market place economics, a dominant position in a market place which requires Commission intervention. Taking into consideration this approach, the White Paper suggested that the category of commercial mobile services can and should be further divided into two separate subgroups.

For lack of a better term, the White Paper suggested that CMS providers be further divided into Commercial 1/Open Entry and Commercial 2/Limited Entry classes. In doing so, the White Paper concluded that the Commission will be better able to apply Congress' finding that market conditions justify differences in the regulatory treatment of some providers of commercial mobile services. The sub-grouping of CMS providers would make clear that most carriers would not be subject to significant Title II or other unnecessary regulatory interference and thereby reduce the need for a legalistic fight over which classification a particular private carrier is to fit in if made on a case by case basis. In this manner, for Federal regulatory purposes there would be little

disruption or difference due to such classification. Such an overall approach would allow the Commission and the industry the greatest degree of flexibility.

It is NABER's view that systems which are operated substantially on a non-profit basis or are not principally engaged for-profit to third party customers not be considered within the commercial mobile service definition. NABER believes that for-profit service on an ancillary or secondary basis should not necessarily convert a private mobile service licensee into a commercial mobile service provider. The Commission should look to the primary activity of the system and not to any ancillary or secondary undertaking which is used to allow the licensee to more efficiently or economically operate its communications system.

It is NABER's view that the legislation clearly intended to include private carrier paging operations in the CMS definition. This interpretation is consistent with past FCC precedents defining interconnected services and with the intent of Congress as set forth in the amendments adopted in the Budget Act.

It is clear from the legislative history that the Congress was intent on giving the Commission the authority to exclude out from commercial mobile service providers certain types of systems offered for profit and interconnected. This language could therefore support a conclusion that traditional SMR operators who do not employ frequency reuse and operate on a wide-area basis even if they use telephone interconnection could be excluded from inclusion in the commercial mobile service provider definition.

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In the Matter of	)	
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Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
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COMMENTS
OF
NATIONAL ASSOCIATION OF BUSINESS AND EDUCATIONAL RADIO, INC.

The National Association of Business and Educational Radio, Inc. ("NABER") by its attorneys respectfully submits, pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. Section 1.415, the following comments in response to the above captioned Notice of Proposed Rule Making.

I. Background

NABER is a national, non-profit, trade association headquartered in Alexandria, Virginia, that represents the interests of large and small businesses that use and provide land mobile radio communications in the operation of their businesses and that hold thousands of license in the private land mobile radio services. NABER has six (6) membership sections representing users, Private Carrier Paging licensees, radio system integrators,

technicians, Specialized Mobile Radio operators and tower site owners and managers. NABER's membership comprises over 6,000 businesses and private carriers holding thousand of licenses in the Private Land Mobile services.

Pursuant to the amendments of the Communications Act adopted in the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"), signed into law on August 10, 1993, the Federal Communications Commission (the "Commission") has issued its Notice of Proposed Rule Making seeking comments on the amendments made to the Act creating a comprehensive regulatory framework for all mobile radio services, including existing common carrier mobile services, private land mobile services and future services such as personal communications service ("PCS"). The revisions to the statute in Sections 3(n) and 332 of the Act require the Commission to promulgate rules which involve a significant number of issues which impact common carrier and private carrier regulation. Accordingly, the Commission in its Notice of Proposed Rule Making has asked for comment on the following broad topics:

- How should the Commission interpret and apply the statutory definitions of commercial mobile service and "private mobile service"?
- How will existing common and private carrier services be classified under such definitions?
- How will future services such PCS be classified?
- What degree of Title II regulation should be imposed on commercial mobile services?

- What transitional measures are necessary to implement the legislative changes?

The Commission has utilized this rule making to examine both the parity issues adopted in the amendments to the Communications Act as well as seek comment on the legislative changes as they apply to PCS. The major premises of Section 6002 adopted in the Budget Act are that "functionally equivalent" mobile services should be subjected to similar regulatory treatment for mobile services and that the Commission should recognize the reduced need for regulation given the competition in such markets.

II. The NABER White Paper

Following adoption of the Commission's Notice of Proposed Rule Making, Emmett B. Kitchen, President of NABER, issued an industry "White Paper" addressed to the NABER membership and its six (6) separate sections. The underlying thrust of the White Paper was to call attention on behalf of the private land mobile industry to the continued need to promote the development of competitive services in the industry with the least amount of regulatory interference by the Commission and individual states. The White Paper proposed that the Commission not engage in a reading of the statute which would lead to uncertainty, regulatory delay and legalistic maneuverings, but one which would recognize that competition in the mobile services allows the Commission to draw broad categories with an extensive forbearance of Title II regulation to permit those systems which are classified as

commercial mobile service providers to, on the whole, be deregulated carriers.

In determining the types of "like" regulation for "similar types of mobile service providers", the Commission should allow the maximum degree of forbearance of its Title II authority, except for those CMS providers which may have obtained, either through significant spectrum holdings or market place economics, a dominant position in a market place which requires Commission intervention. Taking into consideration this approach, the White Paper suggested that the category of commercial mobile services can and should be further divided into two separate subgroups. For lack of a better term, the White Paper suggested that CMS providers be further divided into Commercial 1/Open Entry and Commercial 2/Limited Entry classes. In doing so, the White Paper concluded that the Commission will be better able to apply Congress' finding that market conditions justify differences in the regulatory treatment of some providers of commercial mobile services.

The single most important determinant for supporting reduced regulation by the Commission is the strength of market competition in the mobile industry. Finally, the sub-grouping of CMS providers would make clear that most carriers would not be subject to significant Title II or other unnecessary regulatory interference and thereby reduce the need for a legalistic fight over which classification a particular private carrier is to fit in if made on a case by case basis. In this manner, for Federal regulatory purposes there would be little disruption or difference due to such

classification. Such an overall approach would allow the Commission and the industry the greatest degree of flexibility.[1]

The purpose of the White Paper was to set forth a broad statement for discussion purposes through which the NABER membership and the land mobile community would be able to begin to develop bright line distinctions to stream-line the regulatory approach as adopted by the Congress in the Budget Act of 1993. In broad principal therefore, NABER wishes to reiterate the importance of the overall themes as set forth in the White Paper and to urge the Commission to consider such an approach in undertaking implementation of its interpretation of newly written Sections 3(n) and 322 of the Communications Act. However, the White Paper should not be construed to be a detailed response to all of the issues raised in the NPRM. Further, the underlying approach of the White Paper should not be considered as a lack of recognition by NABER of the importance of the continued spectrum needs of the private mobile services. Rather, the White Paper's purpose is to advocate that the Commission and the industry act in a manner consistent with the new legislation so as not to undermine the continued growth of the land mobile industry for both large and small providers of mobile services to the public.

III. Definitions

The Commission has tentatively concluded that the statutory definition adopted in the Budget Act is intended to bring all existing mobile services within the general category of "mobile

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[1] A copy of the White Paper is attached as Appendix A.

services" for purposes of regulation under the Act. Newly adopted Section 332(d)(1) provides that a mobile service will be classified as a "commercial mobile service" if it meets the following criteria: (a) Service is provided: (i) for profit; and (ii) the system makes "interconnected service" available "to the public" or (b) "to such classes of eligible users as to be effectively available to a substantial portion of the public." Accordingly, each of the elements of the newly adopted definition present their own separate issues for discussion in terms of attempts to classify services as commercial mobile services or private mobile services. The statute
provides that any service which is not a commercial mobile service shall be considered a private mobile service. However, the Commission noted the difference in possible interpretation caused by the "functionally equivalent to a mobile service" language which appears in the newly adopted statutory definition.

On the whole, NABER agrees with the Commission's tentative decision that the statutory definition now brings all existing mobile services within the general category of mobile services for purposes of regulation of the Act. However, in making its selection between classification as commercial mobile service and private services, the Commission should not carelessly disregard present and future needs of particular private users and industries whose mobile communications requirements are not served by third party commercial mobile service providers. The underlying impetus for the change in legislation was the attempt by the Congress to

make certain that certain types of private service providers which had developed so as to provide substantially equivalent and competitive common carrier offerings be classified and regulated similarly.

A. For Profit Service

In the NPRM, the Commission sets forth each of the elements of the definitional test and requests comments to determine what mobile services will be considered to be commercial mobile services for regulatory purposes. The first element of the definition of commercial mobile services is that it must be "for profit". Thus, government and non-profit public safety services would be outside the scope of the commercial mobile service definitions. Similarly, businesses that operate mobile radio systems fully for their own private internal use would not be considered to be providing mobile radio services to customers for profit. The Commission, however, requests comment on whether or not the for-profit test should be based on whether the service "as a whole" is offered on a commercial basis as that term is currently used in Part 90 of the Rules.

It is NABER's view that systems which are operated substantially on a non-profit basis or are not principally engaged for-profit to third party customers not be considered within the commercial mobile service definition. NABER believes that for-profit service on an ancillary or secondary basis should not necessarily convert a private mobile service licensee into a commercial mobile service provider. The Commission should look to

the primary activity of the system and not to any ancillary or secondary undertaking which is used to allow the licensee to more efficiently or economically operate its communications system or network.

B. Interconnected Service

The Commission recognized that the divergence in the House and Senate Reports could lead to two (2) possible interpretations of interconnected service. Specifically, the Senate version which was substantially adopted by the Conference Committee defined interconnected service as that which "must be broadly available" to the public, whereas the proposed House version simply required that only one aspect of the service be interconnected. The NPRM discussed several possibilities for interconnection. NABER wishes to emphasize that it does not endorse any interpretation of interconnection where interconnection is used as a physical interconnection within the system configuration such as for control purposes. Specifically, interconnection should be that which is physically interconnected and available to the end user allowing access from or to the public switched telephone network. Under this approach, the Commission should apply the definition of public switched telephone network to encompass services offered by the local exchange telephone company and inter-exchange carriers undertaken in the provision of the basic exchange service.

The NPRM requests comment on whether private carrier paging licensees who utilize "store and forward" technology in

order to transmit pages and thereby do not transmit the originating line and the terminating page on a real time basis are the type of interconnection intended to be included in the Commercial Mobile Service definition. It is NABER's view that the legislation clearly intended to include private carrier paging operations in the CMS definition. This interpretation is consistent with past FCC precedents defining interconnected services and with the intent of Congress as set forth in the amendments adopted in the Budget Act.

The Act provides that carriers who exercise their rights to obtain interconnection under Sections 332(c)(2) offer interconnected service under Section 332(d). Currently, paging carriers utilize Type I and Type II physical interconnection, both of which are technical arrangements which route calls that originate on the PSTN to the carrier's network for termination. The fact that for efficiency purposes a paging carrier utilizes "store and forward" technology should not remove the interconnected nature of the service offering.

In reaching the above conclusion, the Commission and court decisions in Millicom Corporate Digital Communications, Inc., 65 RR 2d 235 (1983), aff'd sub nom. Telocator Network of America, Inc. v. FCC, 761 F.2d 763 (1985) can be distinguished as being based upon a prior legislative test which did not need to reach the issue of whether the system and services were interconnected. Rather, although the decisions do discuss whether users could control the carrier's transmitters, the case was decided on the

fact that the land stations authorized to Millicom were not multiple licensed or shared as required under the Act.[2] More importantly, both common carrier licensed paging carriers and private carrier paging carriers utilize the store and forward technology. Hence, from a "parity" view, both types of licensees should be considered CMS providers under the new statutory test.[3]

C. Service Available to the Public

NABER is in agreement with the Commission that the definition of Commercial Mobile Service provider is satisfied whereby the service is offered to the public without restriction or the eligibility rules for users are so broad as to constitute a substantial portion of the public. NABER does not believe that the Commission should include in CMS a limited eligibility service or customized service offering to a defined or limited group. Accordingly, SMRs and PCPs satisfy a service generally made available to the public. Other private radio licensees, however, should not generally be considered as meeting such a test. In this respect, community repeater licensees or other licensees operating on a non-profit basis should not be considered CMS providers.

IV. Functional Equivalent

Newly adopted Section 332(d)(3) of the Act defines a "private mobile service" as "a mobile service that is not a commercial

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[2] 65 RR 2d at 238.

[3] There are, of course, certain paging services which are not interconnected or which are not offered to the public. For example, a hospital which provides its own paging services through an internal, private telephone system should not be considered as a CMS provider.

mobile service as defined in Section 332(d)(1)" or the "functional equivalent of a commercial mobile service". In this regard, the functionally equivalent test requires the Commission to examine both the nature of the services and the customer perception of the functional equivalency of those services.

The Conference Report states that the Commission "may determine for instance that a mobile service offered to the public and interconnected with the public switched telephone network is not the functional equivalent of a commercial mobile service if it is provided over a system which either individually or as a part of a network of systems or licenses, does not employ frequency or channel reuse or its equivalent...and does not make service available throughout a standard metropolitan statistical area or other similar wide geographic area".[4]

Accordingly, it is clear from the legislative history that the Congress was intent on giving the Commission the authority to exclude out from commercial mobile service providers certain types of systems offered for profit and interconnected which, in fact, operated on a basis which was not intended to be considered as "functionally equivalent" to CMS operations. Hence, the reference by example to the fact that SMR systems which did not employ frequency reuse and operate over a wide geographic area do not necessarily have to be considered as CMS providers. This language could therefore support a conclusion that traditional SMR operators

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[4] HR Report No. 102-213 103rd Congress, 1st Session at 495-96 (Conference Report).

who do not employ frequency reuse and operate on a wide-area basis even if they use telephone interconnection could be excluded from inclusion in the commercial mobile service provider definition. Although the language in the Conference Report may constitute a sufficient basis for the Commission to utilize exclusions of other systems so as not to be classified as Commercial Mobile Service providers as expressed in the White Paper, NABER is concerned that a case by case analysis may create unnecessary uncertainties and legalistic maneuverings.

Another example of a limited or secondary use of interconnection would be where a traditional SMR system is serving primary dispatch needs of its customers, but allows interconnection only on a secondary or diminimus basis, for example for fleet management purposes to a limited number of users. NABER does not believe that the Act intended to reclassify as CMS such kinds of traditional private carriers. Notwithstanding this approach, however, NABER wishes to emphasize that consistent with the underlying purpose expressed in the White Paper, the Commission should adopt a flexible and deregulated approach to CMS classification. Specifically, as it has done in its PCS proposal, it is possible to foresee an SMR converting its private mobile service operation to that of CMS. If it did so, there should not be any unreasonable delay or administrative hurdle which could be used by competitors to delay or disrupt such a process.

V. Existing Common Carriers Classified as Commercial Mobile Services Should not be Allowed to Provide Dispatch Service Until 1996

The Commission has requested comment on whether existing common carriers that are classified as commercial mobile service providers should be permitted to provide dispatch service. Prior to the adoption of the amendments in the Budget Act, the Communication Act prohibited cellular carriers from providing fleet dispatch offerings. The amendments adopted in the Budget Act could now be interpreted so that common carrier services which are classified as commercial mobile services be allowed to immediately provide dispatch service. It is NABER's view that the dispatch prohibition applicable to cellular operators should continue for the three (3) year transition period set forth in the Budget Act for final implementation of the reclassification of private mobile service to commercial mobile services. In such a manner, there would be less disruption to existing private mobile operators who have built their businesses in partial reliance on this fact. Such a transition period would also be consistent with the Congress' intent in including the three year phase-in period.

VI. Personal Communication Service

NABER believes that the Commission should structure the greatest amount of latitude for personal communication services and allow for both CMS providers and private mobile service providers. Further, the Commission should not institute a regulatory mandate which would prevent private mobile service providers from developing their systems and/or, in the future if necessary,

converting such services to commercial mobile services. The fluidity and developing nature of PCS justifies maximum flexibility for all licensees. At the same time, however, NABER would reiterate the need to make certain that the Commission fully recognize the importance of both the CMS classification and the private mobile service industry needs.

VII. Forbearance from Title II Regulations

Those private mobile service licensees who are faced with classification as commercial mobile service providers or otherwise "threatened" with such classification believe that the single most important aspect of this proceeding is the commitment by the Commission to exercise its forbearance authority under Title II regulation, given the competitive nature of the commercial mobile service markets. The creation of the Commercial I category outlined in the White Paper should allow CMS providers which are clearly non-dominant and not equivalent in market impact to large mobile carriers to operate in a completely deregulated environment. The presence of numerable private carrier paging and radio common carrier providers, the existence of 220 MHz private carriers, the continued development of 900 MHz and the prospect of refarming below 800 MHz all point to the continued, active and vigorous economic development of a competitive mobile services environment. To the extent a CMS provider, by reason of the size of the spectrum band width licensed to it in a market, or because of economic control over a market, may need a greater degree of oversight; such a licensee would fit within the Commercial II grouping as outlined

in the White Paper. Accordingly, NABER's strongest requirement in this proceeding is that the Commission engage in maximum flexibility and regulatory deregulation in forbearing from Title II regulations. Such a result would be consistent with the mandate of the Congress in adopting the amendments to the Communications Act and would be consistent with the public interest.[5]

Finally, the Commission must make certain that it not sweep into commercial mobile service classification those types of systems which, if subject to a greater degree of regulation, would find themselves burdened by costs, unnecessary regulatory delay and competitive offerings which would dwarf their resources. The Commission should treat similarly situated licensees consistently under the new parity definition but should be careful not to utilize functional equivalency to regulate dominant carriers in a similar fashion to smaller carriers. In the Competitive Carrier Docket[6], the Commission determined that carriers should not be regulated unnecessarily under Title II and distinguished between carriers on the basis of their dominance in the market place. In doing so, the Commission defined a dominant carrier as one which possessed market power. In deciding whether a licensee has market power, the FCC found that several factors were important to

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[5] Similar to Title II forbearance, the Commission should also not enforce provisions under the Telephone Operator Consumer Services Improvement Act or with respect to Telecommunications Relay Service costs relating to paging systems.

[6] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services, cc Docket No. 79-252.

consider: (i) market share; (ii) the number and size of distribution of competing firms; (iii) the nature of barriers to entry; (iv) the availability of substitutable services; (v) control of bottleneck facilities; and (vi) the potential for future market entrants. These facts are not exhaustive. However, it is clear at the present that there is little basis for the Commission to apply significant Title II regulation on mobile service providers.

Although it has not been specifically addressed in this proceeding, an additional area for NABER concern on the impact of reclassification of certain private mobile licensees as commercial mobile service providers is that in implementing such newly adopted regulations by the Commission, the Commission be careful to utilize the most favorable aspects of each of the Private Radio and Common Carrier Bureaus in order to foster an environment which will not lead to unnecessary administrative entanglement or delays. It is NABER's view, and particularly that of its Specialized Mobile Radio Section and Private Carrier Paging Section, that the Private Radio Bureau's management of the licensing and regulatory process has fostered the development of a vibrant industry serving hundreds of thousands of customers. In contrast to the litigious history of the radio common carrier industry, NABER members believe that the Commission, in implementing its rule making on an administrative level, should take all steps necessary to preserve the regulatory approach of the Private Radio Bureau as well as the stream-lined licensing processes in Gettysburg, Pennsylvania so that, as an industry, commercial mobile service providers are provided with

regulatory oversight which does not in its administrative processes impede continued development of a vibrant, fast moving industry.

VIII. Other Issues

The Commission also seeks comment on the interconnection rights which should be afforded to commercial mobile service providers. In examining this issue, the Commission requested comment on the interconnection rights of existing mobile services which will be classified as private mobile service providers. The Commission specifically concludes that PCS providers should have a federally protected right to interconnect with LEC facilities regardless of whether they are classified as commercial or private mobile service providers and inconsistent state regulation should be preempted. It is NABER's view that the Commission mandate equal access rights for interconnection which are currently afforded to Part 22 licensees and should equally be applicable to all commercial mobile service providers. Similarly, NABER believes that this right should generally be extended to private mobile service licensees so that they may make certain that their level of interconnection does not act as an economic disincentive to their operations.

Finally, NABER wishes to express its view that those States which exercise their right to make a showing by petitioning the FCC before August 10, 1994 to continue rate regulation that existed as of June 1, 1994 or to initiate new rate regulation be required to satisfy a substantial evidentiary showing in such areas where there is a competitive commercial mobile service market. In this

respect, the Commission must be aware that its prompt resolution of any such petitions for State action need to be made so as not to impede the continued development of the mobile service market. The mandate in the Budget Act now clearly permits the Commission to preempt the States from imposing rate or entry regulations which might interfere with development of the commercial mobile services industry.

IX. Conclusion

WHEREFORE, the National Association of Business and Educational Radio, Inc. hereby respectfully requests that the Commission consider the above-said comments and act in a manner in accordance with the views expressed herein.

Respectfully submitted,
National Association of Business
and Educational Radio, Inc.

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APPENDIX A

A Case for Linking Regulation to Competition in the Regulatory Parity Debate

by E.B. Kitchen

President, National Association of Business and Educational Radio

November 1, 1993

Our Brave New World

The mobile communications industry has gone through tremendous change over the course of the past decade, and we are sure to see the pace of change increase, not decrease, as we head into the next century. In seeking to address some of the changes that have occurred, and in an attempt to anticipate some of the changes yet to come, Congress recently enacted legislation--which our industry refers to as regulatory parity--that's meant to simplify the regulatory treatment of our diverse and complex industry. As the Federal Communications Commission (FCC) develops a new regulatory framework reflecting this realignment of our industry, I recommend that in addition to the new distinction between private mobile service and commercial mobile service, that two classes of commercial mobile service be created, with the criteria for delineation based on competition in the marketplace. I offer this document as a vision for the future of the mobile communications industry and to serve as a foundation for discussion.

The brave new world of communications will soon bring on-line an entire spectrum of personal and mobile services, offering voice, data, and video transmission (e.g., on-line interactive video conferencing) from and to any location in the world. The mobile communications industry, which makes up just one part of this brave new world, includes such diverse services as cellular, personal communications service (PCS), paging, traditional and enhanced specialized mobile radio (SMR and ESMR), and the two-way radio systems used by many independent businesses across America.

Existing and emerging mobile telecommunications technologies offer a myriad of communications services, all unique to their market niche. And, while they all serve

essentially the same basic function--to allow communications between two or more mobile or remote sources--the manner in which each accomplishes this common goal is quite different. It is vital that the regulatory framework that governs this industry reflect both the similarities as well as the differences represented by the various provider groups in order to preserve the diverse strength of the mobile communications industry in America. I believe Congress recognized this fact and in its recent legislation provided regulators with the flexibility they will need to meet these challenges.

Defining and Dividing the Mobile Communications Industry

To ensure that the greatest number of users have the opportunity to benefit from existing and emerging mobile communications technologies, Congress recently passed legislation realigning our industry and reorganizing the regulatory framework that governs it. In so doing, Congress divided the industry into two separate categories: private mobile services and commercial mobile services.

And while Congress gave the FCC final authority to determine which services fit into each category and how those services should be regulated, it did not defer this authority to the Commission without providing some guidance. I believe that Congress's intent was to task the FCC with treating the various segments of the mobile communications market as equal, but separate.

The guidance offered by Congress in defining private mobile communications is simply that this market segment is non-commercial. Congress defined a commercial mobile service as "a mobile service...that is interconnected with the public switched telephone network offered